DEC 15 1966
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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 867 Misc.

NORTON S. BUCK,
Petitioner,

vs.

CITY OF OREGON, OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio.

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In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. _____ Misc.

NORTON S. BUCK,

Petitioner,

vs.

CITY OF OREGON, OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI To the Supreme Court of the State of Ohio.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio in the case entitled City of Oregon, plaintiff-appellee vs. Norton S. Buck, defendant-appellant, Cause No. 40134 on the Docket of the Supreme Court of Ohio, entered on the Docket of the Supreme Court of Ohio on July 20, 1966.

OPINIONS BELOW.

There were no oral or written opinions in the Oregon Municipal Court, in the Common Pleas Court of Lucas County, Ohio, in the Court of Appeals of Lucas County, Ohio, or in the Supreme Court of the State of Ohio.

JURISDICTION.

The judgment of the Supreme Court of Ohio, which affirmed the judgments of the lower State Courts, was entered on June 15, 1966. A timely motion for rehearing filed June 23, 1966, was denied on July 20, 1966. Thereafter a timely application for extension of time in which to file petition for writ of certiorari filed on October 18, 1966, in the Supreme Court of the United States was granted on October 19, 1966, to and including December 17, 1966. The jurisdiction of this Court is invoked under 28 U. S. C. A. Section 1257(3) and 18 U. S. C. A. Rule 38(c) Federal Rules of Criminal Procedure, since the City of Oregon, Ohio, Ordinance Section 1-5-8 No. 49, is invalid as applied by the Supreme Court of Ohio and the lower State courts by reason of repugnancy to the provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States.

QUESTION PRESENTED.

Whether the City of Oregon, Ohio, has the power and jurisdiction to create, define, and prohibit *ab initio* an alleged motor vehicle crime by ordinance, and thereafter to try, convict and sentence an accused thereunder, contrary to and in violation of the express prohibitions and provisions of Ohio Revised Code Sections 4511.06, 4511.07, 4511.19 and 4511.99(B) which revoke all power and jurisdiction theretofore delegated to municipalities to define, prohibit and punish motor vehicle crimes by ordinance.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND ORDINANCE INVOLVED.

The constitutional provisions involved are the Fifth and Fourteenth Amendments of the Constitution of the United States; and Article I, Section 16, Article I, Section 18, Article II, Section 1, Article II, Section 26, Article XVIII, Section 3, of the Constitution of Ohio, which are printed and referred to in Appendix A, *infra*, pp. 15-16.

The statutory provisions involved are Sections 4511.06, 4511.07, 4511.19 and 4511.99(B) of the Revised Code of Ohio, and former Ohio General Code Section 6307-19(a) and (b) which was repealed on October 21, 1953, are printed and referred to in the Reasons For Granting This Writ, *infra*, pp. 5, 6-8.

The ordinance involved is City of Oregon, Ohio, Ordinance Section 1-5-8 No. 49, which is printed and referred to in Reasons For Granting This Writ, *infra*, pp. 5.

STATEMENT OF THE CASE.

The petitioner was arrested, tried, and convicted of operating a motor vehicle while under the influence of intoxicating liquor under an affidavit issued under City of Oregon, Ohio, Ordinance Section 1-5-8 No. 49. Trial by jury resulted in a verdict of guilty. Petitioner was thereupon sentenced to three days in jail, and to pay a fine of $150.00 and costs. On successive appeals to the Common Pleas Court of Lucas County, Ohio, and to the Court of Appeals of Lucas County, Ohio, said Appellate Courts affirmed the verdict, sentence and judgment of the Oregon Municipal Court. On memorandum in support of jurisdiction of the Supreme Court of Ohio on appeal from the Court of Appeals of Lucas County, Ohio, said Supreme Court of Ohio dismissed the motion to certify and dismissed the appeal as of right thereby affirming the judgments of the lower Courts. There were no oral or written opinions rendered by any of the foregoing Courts.

HOW FEDERAL QUESTION PREVIOUSLY PRESENTED.

The lack of jurisdiction of the Oregon Municipal Court, the defective affidavit, the validity of the Oregon Ordinance, the denial of due process and equal protection of the laws under the Federal Constitution, and under the Ohio Constitution and statutes were presented and discussed before trial in the Oregon Municipal Court by written motion to quash and memorandum, by written motion to vacate and set aside the verdict, sentence and judgment and for a new trial after judgment, and in the Assignments of Errors and briefs filed thereafter in the Common Pleas Court of Lucas County, Ohio, in the Court of Appeals of Lucas County, Ohio, and in the Supreme Court of Ohio. (Appendix B, *infra*, pp. 17-18.)

REASONS FOR GRANTING THIS WRIT.

1. This is a criminal case originating by affidavit filed in the Oregon Municipal Court under the provisions of City of Oregon, Ohio, Ordinance Section 1-5-8 No. 49, reading as follows:

Oregon Ordinance Section 1-5-8 No. 49:

"(a) No person who is under the influence of intoxicating liquor or narcotic drugs, or opiates shall operate or be in actual physical control of any vehicle, streetcar or trackless trolley within this city.

(b) Every person who is convicted of a violation of this section, shall be punished by a fine of not more than Five Hundred Dollars or imprisoned in the county or municipal jail for not more than six months, or both such fine and imprisonment."

This Ordinance is based upon former Ohio General Code Section 6307-19(a) and (b) enacted by the Ohio Legislature on September 6, 1941. This State Statute and its penalty were repealed by the Ohio Legislature on October 21, 1953.

The language and the penalty of repealed G. C. 6307-19(a) and (b), and the language and penalty of Section 1-5-8 Oregon Ordinance No. 49, are identical, namely:

G. C. 6307-19 *Operation of Vehicle while intoxicated:*

"(a) No person who is under the influence of intoxicating liquor or narcotic drugs, or opiates shall operate or be in actual physical control of any vehicle, street car or trackless trolley within this state.

(b) Every person who is convicted of a violation of this section shall be punished by a fine of not more than five hundred dollars or imprisoned in the county or municipal jail for not more than six months, or both such fine and imprisonment." (Effective 9-6-1941.) (Repealed October 21, 1953.)

Revocation of Delegated Power.

On October 21, 1953, the Legislature of the State of Ohio, after repealing General Code Section 6307-19(a) and (b), above, duly enacted Ohio Revised Code Section 4511.06, 4511.07, 4511.19 and 4511.99(B), effective on the dates hereinafter shown:

R. C. 4511.06 *Uniform application and precedence of traffic law.* (G. C. 6307-6.)

"Sections 4511.01 to 4511.78, inclusive, 4511.99 and 4513.01 to 4513.37, inclusive, of the Revised Code shall be applicable and uniform throughout this state and in all political subdivisions and municipal corporations therein, and no local authority shall enact or enforce any rule or regulation in conflict with such sections. (Effective October 1, 1953.)

4511.07 *Local traffic regulations.*

"Sections 4511.01 to 4511.78, inclusive, 4511.99 and 4513.01 to 4513.37, inclusive, of the Revised Code do not prevent local authorities from carrying out the following activities with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power:

(A) Regulating the stopping, standing, or parking of vehicles, trackless trolleys, and streetcars;

(B) Regulating traffic by means of police officers or traffic control devices;

(C) Regulating or prohibiting processions or assemblages on the highways;

(D) Designating particular highways as one-way highways and requiring that all vehicles, trackless trolleys, and streetcars thereon be moved in one specific direction;

(E) Regulating the speed of vehicles, streetcars, and trackless trolleys in public parks;

(F) Designating any highway as a through highway and requiring that all vehicles, trackless trolleys, and streetcars stop before entering or crossing the same, or designating any intersection as a stop intersection and requiring all vehicles, trackless trolleys, and streetcars to stop at one or more entrances to such intersection;

(G) Regulating or prohibiting vehicles and trackless trolleys from passing to the left of safety zones;

(H) Regulating the operation of bicycles and requiring the registration and licensing of same, including the requirement of a registration fee;

(I) Regulating the use of certain streets by vehicles, streetcars, or trackless trolleys;

(J) Regulating traffic in reference to school buses. No ordinance or regulation enacted under divisions (D), (E), (F), (G), (I), or (J) of this section shall be effective until signs giving notice of such local traffic regulations are posted upon or at the entrance to the highway or part thereof affected, as may be most appropriate." (Effective 8-11-1961.)

R. C. 4511.19 *Operation of Vehicle while under influence of alcohol or drugs.*

"No person who is under the influence of alcohol, narcotic drugs, or opiates shall operate any vehicle, streetcar, or trackless trolley within this state." (Effective October 21, 1953 and July 11, 1963.)

This is the only state statute in Ohio defining and creating this offense.

R. C. 4511.99(B) *Penalties.*

"* * *

(B) Whoever violates section 4511.19 of the Revised Code shall be fined not more than five hundred dollars and imprisoned in the county jail or

workhouse not less than three days nor more than six months and no court shall suspend the first three days of any sentence provided for under this section.

* * *." (Effective October 10, 1963.)

By the repeal of former General Code Section 6307-19 (a) and (b), and by the enactment of Ohio Revised Code Sections 4511.06, 4511.07, 4511.19, and 4511.99 (B), on the effective dates heretofore noted, the Legislature of the State of Ohio, **expressly revoked** the power and jurisdiction theretofore granted to political subdivisions and municipal corporations to enact and punish motor vehicle offenses in Ohio.

Motor Vehicle Offenses Are General Laws.

By these enactments and reenactments of the Legislature of Ohio, all motor vehicle offenses are now **general laws** required to be of **uniform** operation and application in Ohio, and the Legislature of Ohio thereby assumed direct control, supervision and punishment of motor vehicle offenses in Ohio. The moment that the Legislature enacted the foregoing, all regulations of political subdivisions and all ordinances of municipal corporations relating to motor vehicle offenses became inoperative and of no effect, except such as are designated as **local** traffic regulations in R. C. 4511.07.

The invalidity of Ordinance Section 1-5-8 No. 49, and the lack of power and jurisdiction thereunder, was raised before trial by written motion to quash and memorandum, and, after trial by written motion to vacate and set aside the verdict, sentence and judgment and for a new trial and memorandum, all of which were overruled. (Appendix B, *infra,* pp. 17-18).

Municipalities Have No Jurisdiction.

Under R. C. 4511.06 the City of Oregon can enact only an ordinance which is in strict conformity to R. C. 4511.19 and R. C. 4511.99 (B), no more, no less, and cannot continue to operate under Oregon Ordinance Section 1-5-8 No. '49.

Otherwise, the City of Oregon is defining and creating crimes and offenses and the penalties therefor, and thereby is usurping the power and authority of the Ohio Legislature. Such usurpation is illegal and contrary to law.

This is a question of the jurisdiction of a municipality, in this case the City of Oregon, Ohio, to define a motor vehicle crime and the punishment therefor, ab initio, and to try, convict and sentence an accused after so doing, despite and contrary to the express prohibitions of R. C. 4511.06, R. C. 4511.19 and R. C. 4511.99 (B), and of the Constitution of Ohio.

It is well settled that there are no common-law crimes in Ohio. Indeed, it has been said that this is axiomatic. Likewise, common-law criminal procedure does not obtain in Ohio. In other words all crimes and criminal procedure in Ohio are based on statute or are based on ordinances enacted by municipal corporations pursuant to the authority which has been given or delegated to them by the Constitution or by statute. The General Assembly has assumed the responsibility of defining what acts or omissions are crimes or offenses against the state, and of prescribing suitable penalties in case of guilt, and has provided its own definition and procedure, for the purpose of preventing and punishing crime and protecting life and property against the aggression of persons of criminal tendency. No act, however atrocious, can be punished criminally except in pursuance of a **valid** statute or ordinance, **lawfully enacted.** (15 *Oh. Jur.* 2d 245, Section 7, Crimes and

Procedure as Based on Statutes or Ordinances—Criminal Law.)

The Legislature subject to constitutional limitations, has the power to declare what acts shall be criminal, to provide for and define criminal procedure, to specify how persons accued of violations of law may assert their rights, and to prescribe punishment for crimes committed within the state. **The prohibition of crimes and offenses lies within the domain of the police power of the state, and its exercise is an exclusive prerogative of the state.** (15 *Oh. Jur.* 2d 249, Section 13, Legislative Power, Generally—Criminal Law.)

The state may delegate power to municipal corporations to prohibit and punish minor offenses. **The municipal corporations themselves having no inherent power to enact by-laws or ordinances for the punishment of motor vehicle offenses, but only such power as is conferred upon them by the Constitution or State Legislature, or such as is implied from the powers expressly given them.** (15 *Oh. Jur.* 2d 250, Section 14, Delegation of Power to Municipal Corporations—Criminal Law.)

In the case now before the court, the power heretofore delegated to municipal corporations to prohibit and punish motor vehicle offenses has been expressly revoked by the Ohio Legislature.

15 *Oh. Jur.* 2d 259, Section 23, Repeal or Amendment —Criminal Law:

> "Section 23. Generally—The Legislature has the right to enact such penal statutes as it sees fit, within constitutional limitations. Likewise, it has the right to repeal or amend existing statutes. The repeal of statutes may be by express enactment of conflicting statutes. **When an existing statute is repealed and a new and different statute upon the same subject is**

enacted it is presumed that the Legislature intended to change the operation and effect of the law. In such cases the extinction of the statute, in the absence of the applicability of any saving clause or law, is understood to be an indication that the sovereign power no longer desires the former crime to be punished or regarded as criminal; therefore, under such circumstances, when such a statute is repealed, it is as if it never existed except for the purpose of proceedings previously commenced, prosecuted and concluded, AND NO CONVICTION AFTER REPEAL CAN LEGALLY BE HAD.

A judgment which has been suspended after the repeal of a statute becomes a nullity unless there is a clause or section in reference to pending prosecutions. Statutes are not repealed, however, by a repealing section which is not constitutionally enacted." (Emphasis ours.)

10 *Oh. Jur.* (2d) 459, Section 381, Constitutional Law:

"Section 381. Effect of time when law is enacted. * * *. The state may leave the task of protecting the public health and safety within its limits to municipalities, **but may at any time assume direct control and supervision over the subject by general laws to the exclusion of power over the subject by municipalities. When such laws are enacted, all conflicting municipal regulations become inoperative, and the existence of municipal regulations in no way limits the power of the General Assembly to enact general laws."** (Emphasis ours.)

The powers heretofore granted to political subdivisions and municipal corporations as to motor vehicle offenses being expressly revoked by the Ohio Legislature, the Oregon Ordinance is inoperative as if it never existed. Therefore, it is no longer lawful or valid and is absolutely void.

It follows that any verdict, sentence and judgment based upon such an ordinance and affidavit issued thereunder is illegal and void. All action taken thereunder is a nullity, the petitioner cannot be **lawfully** convicted thereunder, and no Court can **lawfully** pronounce sentence thereon according to law.

Affidavit Not Sufficient and Illegal.

2. Furthermore, the affidavit in this case is sworn to on information and belief. This defect is fatal. The affidavit is not sufficient in law to charge the alleged offense. On this state of the case no evidence can be received and no lawful trial can be had.

5 *O. Jur.* (2d) Arrests, Section 11, at page 26,

> "An affidavit upon belief is insufficient although such an affidavit will not in the absence of a motion to quash deprive the court of jurisdiction. * * *."

City of Willoughby v. Hugebeck, 206 N. E. (2d) (Ohio Cases) 234, 2 O. A. (2d) 36, Syllabus #3:

> "An 'oral demurrer' to affidavit charging speeding offenses stating that affiant had just and reasonable grounds to believe that person named committed the offense searched the affidavit as a criminal pleading and discovered the fatal defect of information and belief jurat, so that demurrer treated as motion to dismiss should have been sustained notwithstanding no motion to quash as such, was filed."

At page 236,

> "At trial, certain other language in the ticket was indirectly called into question. Complaint was made that the affidavit was not properly sworn to. We note that the jurat on the ticket recited:
>
> 'The undersigned further states that he has just and reasonable grounds to believe and does believe

that the person named above committed the offense herein set forth, contrary to law.'

"The oath therefore is taken on 'reasonable grounds to believe' as distinguished from the positive statement of fact required by the Language of Section 2935.17 and 2935.19, Revised Code."

3. The Fifth Amendment to the Federal Constitution provides, as far as pertinent here, as follows:

"No person * * * shall * * * in any criminal case * * * be deprived of life, liberty or property, without due process of law; * * *."

The portion of the Fourteenth Amendment to Federal Constitution relied upon reads in part as follows:

"No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *."

Circumvention of Federal Constitution.

The State Courts have an obligation and a duty to safeguard the Federal rights of the petitioner and to safeguard the State rights of the petitioner.

The facts in this case disclose a shocking and total failure by the Courts of the State of Ohio to follow and obey the constitutional guarantees of the Constitution of Ohio and of the provisions of the statutes of Ohio. Such a suspension of the Ohio Constitution and statutes is a circumvention of the Constitution of the United States.

The administration of justice is not a game. The failure of the Courts of the State of Ohio to obey and follow the Constitution and statutes of Ohio tends to destroy the entire system of restraints which safeguard the lives and liberties of all persons.

The constitutional guarantees set forth in the Fifth and Fourteenth Amendments to the Constitution of the United States guaranteeing to all persons due process of law and equal protection of the laws are enforceable against the State of Ohio.

CONCLUSION.

It is respectfully suggested that on the basis of all of the foregoing, it is clear that the Ohio Courts have deprived the petitioner of rights guaranteed to him by the Constitution of the United States.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

Constitutional Provisions.

The Statutes and the Ordinance are printed in the brief.

Constitution of the United States, Fifth Amendment (Rights of Persons).

"No person * * * shall * * * in any criminal case * * * be deprived of life, liberty or property, without due process of law;* * *."

Fourteenth Amendment (rights of Citizens).

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction and the equal protection of the laws."

Constitution of Ohio.

Article I, Section 16, Redress in courts.

"All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

* * *"

Article I, Section 18. Suspension of laws.

"No power of suspending laws, shall ever be exercised, except by the General Assembly."

Article II, Section 1. In whom legislative power is vested; initiative and referendum.

"The legislative power of the state shall be vested in a general assembly * * *.

Article II, Section 26. What laws to have a uniform operation.

"All laws, of a general nature, shall have a uniform operation throughout the state; nor shall any act, * * *, be passed, to take effect upon the approval of any other authority than the general assembly, except as otherwise provided in this constitution."

Article XVIII, Section 3. Powers.

"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

APPENDIX B.

Oregon Municipal Court—Motion to Quash and Memorandum.

Now comes the defendant, * * *, and moves the Court to quash the alleged affidavit by reason of certain defects apparent upon the face of the record, namely:

* * *

2. The Oregon Municipal Court or any Judge thereof has no power or jurisdiction to try or sentence the defendant under Ordinance No. 49—Section 1-5-8 because the said affidavit does not state or charge an offense punishable by the laws of Ohio, in that:

* * *

(c) the violation of Ordinance No. 49—Section 1-5-8 does not constitute a crime under the statutes of Ohio.

(d) Ordinance No. 49—Section 1-5-8 is unconstitutional and void and any conviction thereunder as well as any arrest thereunder is a denial of due process of law * * *.

Oregon Municipal Court—Motion for a New Trial.

Now comes the defendant, * * *, and moves the Court for an order to vacate and set aside the verdict of the jury herein and for a new trial on each and every one of the following grounds:

* * *

5. Error in overruling the defendant's motion for discharge.

6. Error in prosecuting and trying the defendant under an ordinance which conflicts with the statute and which is not of uniform operation in the State of Ohio as required by law and which does not state an offense, because the Court is without power or jurisdiction to do so.

Oregon Municipal Court—in the Memorandum in Support of Motion for New Trial.

* * *

R. C. 4511.06 requires uniform application and precedence of traffic law, provides that R. C. 4511.01 to 4511.78, inclusive, and R. C. 4511.99 and 4513.01 to R. C. 4513.37 inclusive, shall be applicable and uniform throughout the state and in all political subdivisions and municipal corporations therein, **and no local authority shall enact or enforce any rule or regulation in conflict with such sections.**

* * *

Oregon Municipal Court—Portion of the Record—Jurat of the Affidavit.

The undersigned further states that he has just and reasonable cause to believe, and does believe, that the defendant herein named committed the above offense as aforesaid, contrary to the form of the statute or ordinance in such case made and provided.

APPENDIX C.

Opinions of the Lower Courts.

No oral or written opinion in the Supreme Court of Ohio.

No oral or written opinion in the Court of Appeals of Lucas County, Ohio.

No oral or written opinion in the Common Pleas Court of Lucas County, Ohio.

No oral or written opinion in the Oregon Municipal Court.

APPENDIX D.

Judgment of the Supreme Court of Ohio on Appeal as of Right Entered June 15, 1966.

This cause here as an appeal as of right from the Court of Appeals for Lucas County, was heard in the manner prescribed by law and no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Oregon Municipal Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Lucas County for entry.

Judgment of the Supreme Court of Ohio on Motion to Certify Entered June 15, 1966.

It is ordered by this Court that this motion is overruled.

Judgment of the Supreme Court of Ohio on Rehearing Entered July 20, 1966.

It is ordered by the Court that rehearing in this case is denied.

SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
FEB 21 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 867 — [redacted]

CITY OF OREGON,

Respondent

vs.

NORTON S. BUCK,

Petitioner

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 867 — Misc.

CITY OF OREGON,

Respondent

vs.

NORTON S. BUCK,

Petitioner

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent respectfully asks this Court to deny the Petitioner's application for a Writ of Certiorari for the reason that there are no substantial constitutional questions involved and that no issues of general public interest have been presented.

OPINIONS BELOW.

There were no oral or written opinions in the Oregon Municipal Court, in the Common Pleas Court of Lucas County, Ohio, in the Sixth District Court of Appeals of Lucas County, Ohio, or in the Supreme Court of the State of Ohio.

QUESTION PRESENTED.

Whether the City of Oregon, Ohio, has the power and jurisdiction to create, define, and prohibit *ab initio* an alleged motor vehicle crime by ordinance, and thereafter to try, convict and sentence an accused thereunder, contrary to and in violation of the express prohibitions and provisions of the Ohio Revised Code Sections 4511.06, 4511.07, 4511.19 and 4511.99 (B) which revoke all power and jurisdiction theretofore delegated to municipalities to define, prohibit and punish motor vehicle crimes by ordinance.

STATUTORY PROVISIONS AND ORDINANCE INVOLVED.

The statutory provisions involved are Sections 4511.19 and 4511.99 (B) of the Ohio Revised Code, and they provide as follows:

R.C. 4511.19 Operation of Vehicle while under influence of alcohol or drugs

"No person who is under the influence of intoxicating liquor, narcotic drugs, or opiates shall operate any vehicle, streetcar, or trackless trolley within this state."

R.C. 4511.99 Penalties

"(B) Whoever violates Section 4511.19 of the Revised Code shall be fined not more than five hundred dollars and imprisoned in the county jail or workhouse not less than three days nor more than six months and no court shall suspend the first three days of any sentence provided for under this section."

The ordinance involved in City of Oregon, Ohio, Ordinance Section 1-5-8 No. 49, and it provides as follows:

Section 1-5-8 Oregon Ordinance No. 49, Operation of Vehicles while intoxicated; Penalty

"(A) No person who is under the influence of intoxicating liquor or narcotic drugs, or opiates shall operate or be in actual physical control of any vehicle, streetcar or trackless trolley within this city.

"(B) Every person who is convicted of a violation of this section, shall be punished by a fine of not more than Five Hundred Dollars or imprisonment in the county or municipal jail for not more than six months or both such fine and imprisonment."

STATEMENT OF THE CASE.

The petitioner was arrested, tried, and convicted of operating a motor vehicle while under the influence of intoxicating liquor under an affidavit issued under City of Oregon, Ohio, Ordinance Section 1-5-8 No. 49. Trial by jury resulted in a verdict of guilty. Petitioner was thereupon sentenced to three days in jail, and to pay fine of $150.00 and costs. On successive appeals to the Common Pleas Court of Lucas County, Ohio, and to the Court of Appeals of Lucas County, Ohio, said Appellate Courts affirmed the verdict, sentence and judgment of the Oregon Municipal Court. On memorandum in support of jurisdiction of the Supreme Court of Ohio on appeal from the Court of Appeals of Lucas County, Ohio, said Supreme Court of Ohio dismissed the motion to certify and dismissed the appeal as of right thereby affirming the judgments of the lower Courts. There were no oral or written opinions rendered by any of the foregoing Courts.

REASONS FOR DENYING THIS WRIT.

1. The authority for a municipality to enact legislation of this type is governed by Article XVIII, Section 3 of the Ohio Constitution, which provides as follows:

> "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

It will be seen from the above constitutional provisions that the only restrictions placed upon the municipality is that its ordinance must not be "in conflict" with the general law.

2. The City of Oregon Ordinance is not "in conflict" with the general laws of the State of Ohio, because it does not prescribe a penalty more severe than that which is set out in the State Statutes.

Section 4511.19 and 4511.99 (B) of the Ohio Revised Code reads as follows:

R.C. 4511.19 Operation of Vehicle while under influence or alcohol or drugs

"No person who is under the influence of intoxnarcotic drugs, or opiates shall operate any vehicle, streetcar, or trackless trolley within this state."

R.C. 4511.99 Penalties

"(B) Whoever violates section 4511.19 of the Revised Code shall be fined not more than five hundred dollars and imprisoned in the county jail or workhouse not less than three days nor more than six months and no Court shall suspend the first three days of any sentence provided for under this section."

Section 1-5-8 of Ordinance 49, City of Oregon, Ohio reads as follows:

Section 1-5-8 Oregon Ordinance No. 49, Operation of Vehicles while intoxicated; Penalty

"(A) No person who is under the influence of intoxicating liquor or narcotic drugs, or opiates shall operate or be in actual physical control of any vehicle, streetcar or trackless trolley within the city.

"(B) Every person who is convicted of a violation of this section, shall be punished by a fine of not more than Five Hundred Dollars or imprisonment in the county or municipal jail for not more than six months, or both such fine and imprisonment."

Section 21-6-9 of Ordinance 37-38, City of Toledo, Ohio, reads as follows:

Section 21-6-9 Operation of vehicles while intoxicated; Penalty

"(A) No person who is under the influence of intoxicating liquor or narcotic drugs, or opiates shall operate or be in actual physical control of any vehicle, street car or trackless trolley within this city.

"(B) Every person who is convicted of a violation of this section shall be punished by a fine of not more than Five Hundred Dollars or imprisonment in the county or municipal jail for not more than six months, or both such fine and imprisonment."

In the case at bar, the Petitioner is attempting to show "a conflict" between the enacted ordinances of municipalities and the State Statute, because the penalty provisions are not similar and because the phrase "physical control" is included in the ordinances.

In *Village of Struthers v. Sokol, 108 Ohio State 263,* the Court stated in paragraph 3 of the syllabus:

> "3. A police ordinance is not in conflict with the general law upon the same subject merely because certain specific actions are declared unlawful by the ordinance which actions are not referred to in the general law. . . . ."

In the *City of Toledo vs. Best, 172 Ohio State 671,* the Ohio Supreme Court held that difference in penalty did not amount to "conflict" so long as the degree of offense (misdemeanor or felony) was the same. This case also involved an ordinance which included the offense of physical control and the Court did not see fit to invalidate the ordinance on such grounds.

In *City of Sidney v. Thompson, 118 Ohio App. 512,* the Court noted in paragraph one of the syllabus as follows:

> "1. A municipal ordinance making it an offense to 'operate or be in actual physical control' of a vehicle while under the influence of intoxicating liquor . . . is not in conflict with Section 4511.19 of the Revised Code which excludes physical control as a possible statutory offense."

The Respondent contends that the cases recited above clearly indicate that there is no conflict between the ordinance and the statute. The City Ordinance of Toledo, Ohio, was inserted herein to show that it is exactly the same ordinance, word for word, as is the ordinance of the City of Oregon, and both cities are contiguous to each other in Ohio. The City of Toledo ordinance has been approved by the Supreme Court of Ohio on more than one occasion.

3. The affidavit upon which a warrant for arrest was issued must have been proper and valid, because the Petitioner did not raise this as one of the issues on his appeal

to the Supreme Court of Ohio. The Petitioner presented four questions for review, but the complaint about the "affidavit" was not one of them. It is an elementary rule of jurisprudence that a reviewing Court will not pass upon errors of law which were not presented for appraisal by the Appellate Courts of inferior jurisdiction.

4. There must not have been any noticeable "Circumvention of Federal Constitution," since the Petitioner fails to recite any specific instance of same, and also fails to give this Court any authority to support such a statement.

CONCLUSION

It is the position of Respondent that the Supreme Court of the United States is without jurisdiction to hear the appeal for the following reasons:

1. No federal questions whatsoever were involved in the determination of the cause by the Supreme Court of Ohio.

2. The ordinance as construed by the state Courts, trial and appellate was shown not to be in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States.

3. Questions which are presented to this Court have not been reviewed by the Appellate Courts of inferior jurisdiction.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,
Miss Nina Sherman
Oregon Municipal Court
Oregon, Ohio
Attorney for Respondent

Of Counsel:
John J. Burkhart
Court House
Oregon, Ohio

APPENDIX A

JUDGMENTS OF THE SUPREME COURT OF OHIO.

This cause here as an appeal as of right from the Court of Appeals for Lucas County, was heard in the manner prescribed by law and no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Oregon Municipal Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Lucas County for entry.

Judgment of the Supreme Court of Ohio
On Motion to Certify Entered June 15, 1966

It is ordered by this Court that this motion is overruled.

Judgment of the Supreme Court of Ohio on
Rehearing Entered July 10, 1966

It is ordered by the Court that rehearing in this case is denied.